

IN THE COURT OF APPEALS OF TENNESSEE
AT MEMPHIS
October 10, 2000 Session

**BOBBIE F. MIXON v. GREAT SOUTHERN LIFE INSURANCE
COMPANY, ET AL.**

**An Appeal from the Circuit Court for Shelby County
No. 91271 T.D.-4 James E. Swearingen, Judge**

No. W2000-00205-COA-R3-CV - Filed August 21, 2001

This case involves the voiding of a life insurance policy. The insurer refused to pay because the insured failed to disclose in his application the name of a physician who had treated him for high blood pressure. The beneficiary under the policy filed suit against the insurer, asserting that the failure to disclose was not a misrepresentation, and that the policy could not be voided because the form requesting the information was not attached to the policy, as required by Tennessee Code Annotated § 56-7-2307(4) (2000). The trial court granted summary judgment to the insurer. On appeal, we affirm, finding that the failure to disclose was a misrepresentation that increased the risk of loss to the insurer.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W.FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Mark Ledbetter, Dan T. Bing, Memphis, Tennessee, for the appellant, Bobbie F. Mixon.

Gregory W. O'Neal, Memphis, Tennessee, for the appellee, Great Southern Life Insurance Company.

OPINION

This case involves the voiding of a life insurance policy. Gary Mixon ("Mixon") and Alan Emmons were co-owners of M & E Auto Parts. On March 7, 1994, they applied for life insurance coverage from Great Southern Life Insurance Company ("Great Southern") through its agent,

Charles Alexander (“Alexander”). The application form provided by Great Southern included the following question:

10. Has the Proposed Insured: . . .

(C) within the past 10 years been diagnosed as having, or been treated for high blood pressure, heart disease or disorder, stroke, cancer or blood disorder, diabetes, kidney, lung or liver disease, mental or nervous system disorder or Acquired Immune Deficiency Syndrome (AIDS)?

G Yes (Give details) G No

Alexander filled out Mixon’s application based on Mixon’s verbal responses to the questions listed. On the question above, Alexander circled “high blood pressure” and checked the box marked, “Yes.” Near the bottom of the page, Alexander made the following notation:

Prop. Ins. has some high blood pressure - controlled with medication. 1 pill per day.
- No other health problems. Dr. Charles Tucker, Ash Flat Clinic, Ash Flat, AR.

The second page of the application stated the following:

I/we represent to Great Southern Life Insurance Co. that the statements made on this application are true, complete and correctly recorded to the best of my/our knowledge and belief and I/we agree that the Company can rely on these statements. I/we agree that this application (a) shall consist of Part I and if required, Part II and/or any medical examination form and any supplemental application, and (b) will be the basis for any policy issued on this application.

. . .[T]he Company HAS NO LIABILITY UNLESS AND UNTIL THE FOLLOWING CONDITIONS A, B, AND C ARE MET EXACTLY.

A. The policy must be delivered to and accepted by the owner while all persons proposed for insurance are alive.

B. The first modal premium must be paid while all persons proposed for insurance are alive.

C. At the time the policy is delivered and accepted, the answers in each part of the application must still be true and complete with no material changes.

If all three of these conditions are met, the policy will be effective from its Policy Date.

Below this passage on the application, Mixon signed his name.

Subsequently, as part of the application process, Great Southern required Mixon to undergo a physical examination. The examination was conducted on March 11, 1994, by Audrey Tharpe, a nurse with PortaMedic, a company that conducts physical examinations and questions applicants for insurance policies. As part of the examination, Tharpe asked Mixon four questions listed on a "Short Form Examination" provided by Great Southern. The first question asked:

During the past 5 years, have you consulted any physician or practitioner for any reason, including routine examination or check up? If yes, state approximate date, purpose, illness, injury or condition, and give full name and complete address of physician and/or hospital.

In response to this question, Tharpe checked the box marked "Yes" and made the following notation:

Dr. Tucker Ash Flat, Ark. Ash Flat Clinic. 1991 Treated for High Blood Pressure
Norvasc Tabs 2X daily

Mixon signed this page, below a declaration that the information on the form was true and correct to the best of his knowledge and belief. Tharpe testified by affidavit that Mixon did not identify any other physicians who had treated him in the previous five years.

On March 15, 1994, Great Southern issued a life insurance policy to Mixon in the amount of \$176,586. The primary beneficiary under the policy was Mixon's wife, Bobbie F. Mixon. When Great Southern delivered the policy to Mixon, it did not attach the short form examination completed by Tharpe.

On August 28, 1994, Mixon died as a result of hemorrhagic pancreatitis. In September 1994, Mrs. Mixon filed a claim for benefits under the Great Southern life insurance policy. On the form entitled, "Claimants' Statement," Mrs. Mixon answered the following question:

Names and addresses of all physicians or practitioners who attended the deceased during the past five (5) years.

In response, Mrs. Mixon listed "S. Golden - First Care Clinic, JB, AR," as well as Dr. Charles Tucker, the physician Mixon listed on the short form examination. Mrs. Mixon noted that Dr. Golden had treated her husband for high blood pressure and cholesterol on April 9, 1994.

After receiving this information, Great Southern contacted Dr. Stephen Golden with the First Care Clinic in Jonesboro, Arkansas, and requested Gary Mixon's medical records. Dr. Golden's records indicated that he had treated Gary Mixon for high blood pressure and cholesterol periodically from 1989 to 1993. On February 12, 1993, Dr. Golden tested his blood cholesterol level, and found it to be at an extremely high level. Dr. Golden's records indicated that Dr. Golden prescribed many different medications to lower Mixon's blood cholesterol level to a more reasonable number, and

to control his high blood pressure. Dr. Golden's records also showed that he treated Mixon several times from February through July 1993.

After reviewing Dr. Golden's records, Great Southern denied Mrs. Mixon's claim for benefits, taking the position that her husband had misrepresented material facts on his application and the short form examination, thereby increasing the risk of loss on Great Southern's life insurance policy. On November 12, 1997, Mrs. Mixon filed a lawsuit in Circuit Court, seeking judgment for the full policy amount, plus a statutory penalty of 25% of the policy amount for bad faith denial of benefits. *See* Tenn. Code Ann. § 56-7-105 (2000). Following discovery, Great Southern moved for summary judgment, arguing it was entitled to judgment based on Mixon's failure to disclose on the short form examination his treatment by Dr. Golden. The trial court granted summary judgment to Great Southern. Mrs. Mixon now appeals.

On appeal, Mrs. Mixon raises two issues. She argues first that her husband did not misrepresent his medical history by failing to disclose his treatment by Dr. Golden, because the question on the short form examination asked for "any" physician, not "all" physicians. Mrs. Mixon asserts that she included Dr. Golden's name and address on the claimant's statement because it asked for "all" physicians. At most, Mrs. Mixon argues, the question on the short form examination is ambiguous and should be construed against the insurer. Second, Mrs. Mixon argues that any misrepresentation on the short form examination cannot void the life insurance policy because the short form was not attached to the policy when issued, as required by Tennessee Code Annotated § 56-7-2307(4) (2000).

In this case, the facts are undisputed. Since only questions of law are involved, we review the trial court's grant of summary judgment *de novo*, with no presumption of correctness. *See Warren v. Estate of Kirk*, 954 S.W.2d 722, 723 (Tenn. 1997).

On appeal, Mrs. Mixon argues first that Gary Mixon's failure to disclose the treatment by Dr. Golden was not a material misrepresentation of his medical history that increased Great Southern's risk of loss on the policy. Tennessee Code Annotated § 56-7-103 states:

No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

Tennessee Code Annotated § 56-7-103 (2000). Thus, to void a claim under § 56-7-103, the insurer must first show that the answer provided by the insured was a misrepresentation, i.e., that it was false. *See* Tenn. Code Ann. § 56-7-103; *Spellmeyer v. Tennessee Farmers Mut. Ins. Co.*, 879 S.W.2d 843, 845-46 (Tenn. Ct. App. 1993) (quoting *Womack v. Blue Cross & Blue Shield of*

Tennessee, 593 S.W.2d 294, 295 (Tenn. 1980)). Whether the answer provided in the application is false is a question of fact, but it may be determined by the court if reasonable minds can only reach one conclusion as to whether the answer is true or false. *See Spellmeyer*, 879 S.W.2d at 846 (citation omitted). An insured's misrepresentation to the insurer can void the policy only if (1) the insured made the misrepresentation with actual intent to deceive, or (2) the misrepresentation increases the risk of loss to the insurer on the policy. *See* Tenn. Code Ann. § 56-7-103; *Spellmeyer*, 879 S.W.2d at 846. Whether the misrepresentation increases the risk of loss to the insurer is a question of law. *See Spellmeyer*, 879 S.W.2d at 846 (citation omitted).

Therefore, we must first determine whether reasonable minds could conclude only that the answer provided by Mixon on the short form examination was a misrepresentation. It is undisputed that the short form examination asked Mixon whether he had consulted "any" physician for "any" reason in the past five years. If so, he was then asked to list the physician's name and address. Mixon listed only one physician, Dr. Tucker, knowing that he had also consulted Dr. Golden on numerous occasions in 1993 regarding his cholesterol and high blood pressure. Mrs. Mixon argues that, regardless of how many physicians had treated Mixon, it was not a misrepresentation to list only one physician because the form asked for "any" physician rather than "all" physicians. This reasoning can only be characterized as sophistry and must be rejected. We conclude that reasonable minds can conclude only that Mixon's failure to list Dr. Golden on the short form examination was a misrepresentation. Next, must consider whether this misrepresentation increased Great Southern's risk of loss on the life insurance policy. As noted above, this is a question of law. *Id.* A misrepresentation increases the risk of loss "when it is of such importance that it 'naturally and reasonably influences the judgment of the insurer [sic] in making the contract.'" *Sine v. Tennessee Farmers Mut. Ins. Co.*, 861 S.W.2d 838, 839 (Tenn. Ct. App. 1993) (quoting *Seaton v. National Grange Mut. Ins. Co.*, 732 S.W.2d 288, 288-89 (Tenn. Ct. App. 1987)). *See also State Farm Gen. Ins. Co. v. Wood*, 1 S.W.3d 658, 661-62 (Tenn. Ct. App. 1999). It is not necessary to find that the policy would not have been issued had the truth been disclosed, but "[i]t is sufficient that the insurer was denied information which it sought in good faith and which was deemed necessary to an honest appraisal of insurability." *Wood*, 1 S.W.3d at 662 (quoting *Loyd v. Farmers Mut. Fire Ins. Co.*, 838 S.W.2d 542, 545 (Tenn. Ct. App. 1992)). In this case, it is undisputed that Mixon received extensive treatment from Dr. Golden from 1989 to 1993 for high blood pressure and abnormally high blood cholesterol levels. This information is clearly "necessary to an honest appraisal of insurability." Under these circumstances, we must conclude that Mixon's failure to disclose to Great Southern his treatment by Dr. Golden constituted a misrepresentation that increased Great Southern's risk of loss on the policy.

Mrs. Mixon also argues on appeal that, even if Mixon's failure to disclose the treatment by Dr. Golden was a misrepresentation that increased the risk of loss, it cannot be the basis for voiding the life insurance policy because the short form examination, from which Dr. Golden's name was

omitted, was not attached to the life insurance policy when it was issued. Tennessee Code Annotated § 56-7-2307 states:

No policy of life insurance shall be issued in this state or be issued by a life insurance company organized under the laws of the state unless the same shall contain the following provisions:

* * *

(4) STATEMENTS ARE REPRESENTATIONS AND NOT WARRANTIES IN ABSENCE OF FRAUD; WRITTEN APPLICATION MADE PART OF POLICY. A provision, except in industrial policies, that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall void the policy unless it is contained in a written application, and a copy of such application is endorsed upon or attached to the policy when issued;

Tenn. Code Ann. § 56-7-2307 (2000). Thus, under section 56-7-2307(4), no statement by the insured can void the policy unless it is contained in a written application and the entire application is “endorsed upon or attached to the policy when issued.” *Id.* See also *Adams v. Manhattan Life Ins. Co.*, 141 S.W.2d 930, 932 (Tenn. Ct. App. 1939). As stated by the Supreme Court of Washington:

[T]he insured has a duty to read the insurance application when he receives it with his policy and to call any inaccuracies to the attention of the insurer. In such a situation, the insured is entitled to have the whole application before him, if any part is to be used against him as a defense.

Lundmark v. Mutual of Omaha Ins. Co., 498 P.2d 867, 869 (Wash. 1972) (citation omitted). In the case at bar, it is undisputed that Great Southern did not attach the short form examination completed by Tharpe and signed by Mr. Mixon.

However, in *Adams*, this Court held that:

Although the application is not admissible in evidence as a part of the contract if a copy of it has not been attached to the policy in accordance with the statute, it may be admitted to prove that the policy was procured by fraud and misrepresentation.

Adams, 141 S.W.2d at 932. The *Adams* case involved facts similar to those in the case at bar. In *Adams*, in Part 2 of an application for life insurance, the insured misrepresented several facts regarding diseases he had contracted and doctors who had treated him. *See id.* at 931. In addition, the examining physician had made notes of the insured’s responses to questions on “Part 2” of the application. The application referred to the physician’s notes, but the notes were not made part of the application. The policy issued to the insured did not contain a copy of the entire application, and

did not include the physician's notes regarding the insured's response to the questions at issue. *See id.* This Court concluded that when the entire application is not attached to the policy, the application is admissible, not as a part of the contract, nor to show that the policy was void under contract, but nevertheless admissible to show that the policy was fraudulently procured. *See id.* at 933-934 (quoting *Couch v. Life & Accident Ins. Co.*, 34 Ga. App. 543, 130 S.E. 596 (Ga. Ct. App. 1925)). *See also Life & Cas. Ins. Co. of Tennessee v. Ayers*, 281 S.W.2d 75, 78 (Tenn. Ct. App. 1954). Therefore, the insurance company cannot rely on the misrepresentation to void the policy in a breach of contract action if it was not attached to the policy. However, the insurance company can use the misrepresentation to show that the insured fraudulently procured the insurance policy. This reflects the distinction "between a suit to avoid an obligation under contract due to a breach and an action seeking to void a contract on the ground that the contract was fraudulently procured." *Gilbert*, 595 S.W.2d at 86 (citation omitted).

In this case, the trial court's order granting summary judgment states that "there is no genuine issue as to any material fact on the Plaintiff's claims against [Great Southern], in that Gary Mixon failed to disclose his prior treatment . . . in the Medical Examination form dated March 11, 1994." In the application, Mixon was asked whether he had been treated for high blood pressure and, if so, was asked to "give details." Mixon disclosed his high blood pressure but noted only his treatment by Dr. Tucker and did not mention the extensive treatment for high cholesterol and high blood pressure by Dr. Golden. As part of the application process, Mixon was required to undergo a medical examination, and in the course of doing so, he responded to questions on the short form examination. As noted above, his responses on this form constituted a misrepresentation that increased Great Southern's risk of loss under Tennessee Code Annotated § 56-3-107. Under all of these circumstances, we must conclude the trial court's grant of summary judgment to Great Southern is not error, on the basis that Mixon fraudulently procured the insurance policy by failing to disclose his treatment by Dr. Golden on either the application or the short form examination incorporated into the application.

The decision of the trial court is affirmed. Costs on appeal are taxed to the Appellant, Bobbie F. Mixon, and her surety, for which execution may issue if necessary.

HOLLY KIRBY LILLARD, JUDGE